87-466

No.

Supreme Court, U.S.
FILED
SEP 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN SADLER,

Petitioner,

vs.

[ALUMISMITHS, INC., an Illinois corporation, and] JAMES HILLE,

Respondent[s].

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

1.

Whether petitioner has, by reason of the provision of Rule 9(a) of the Federal Rules of Civil Procedure that: "When a party desires to raise an issue as to the . . . capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.", in failing to raise the following issues by answer, has waived his right to move to vacate an injunction, and to strike the appearance of ALUMISMITHS, INC., and the appearance of its attorneys, and to dismiss the action as to it, for want of jurisdiction of the person of the corporation, (by reason of the fact that the president has no authority to file this suit in the name of the corporation

against a fellow stockholder and director and officer, without the approval of its board of directors or the approval of its stockholders, with the result that in order to bring the corporation into court it must be named a party defendant and served with summons), and to move to dismiss this suit against the president with sanctions against him and his attorneys for a violation of 28 USC § 1359, (for improperly or collusively naming the corporation as a party plaintiff to make it appear that it had invoked the jurisdiction of the Federal courts, when it had not done so), although petitioner has never questioned the capacity of the corporation to sue, but only the fact that it has done so.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

JOHN SADLER, Petitioner, by his attorney HUGH M. MATCHETT, prays the Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review a judgment entered on June 9th, 1987, affirm-

ing, with costs, the order appealed from.

This petition is due to be filed on or before Tuesday, September 8th, 1987.

OPINION BELOW

The opinion appears in Appendix "A".

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U.S. Code, § 1254(1).

STATEMENT OF THE CASE

This was an appeal from an order of April 25th, 1986, denying a motion to vacate a preliminary injunction entered on September 14th, 1986, without bond, on the motion of "ALUMISMITHS, INC.." restraining JOHN SADLER "from using the trademark, 'Lumiweld #3', 'Lumiweld', or any derivative thereof", and "from using the name ALUMISMITHS, ALUMISMITHS, INC., or any derivative thereof""for or in connec-

tion with any marketing, advertising, soliciting, manufacturing, production, or research and development" and "from representing himself at any trade show or any public place that he is the chief executive officer of ALUMISMITHS, INC. and that 'Lumiweld #3' is superior to the original 'Lumiweld'."

Jurisdiction in the district court was invoked by the individual plaintiff, and purportedly invoked by the purported corporate plaintiff, under 28 USC § 1332. Petitioner denies that it exists in this case. He invoked the jurisdiction of the court of appeals under 28 USC § 1292.

The complaint alleges that he has diluted and maligned the corporation's trademark, and the purported corporate plaintiff has purportedly prayed for equitable relief, an accounting, damages, and specific performance of a buy-sell stock agreement based on a purported

breach of contract. The individual plaintiff joins in the prayer for an accounting and for damages.

The answer denies the basic allegations, but Mr. Clark, petitioner's former attorney, who filed it, failed to deny that ALUMISMITHS, INC., was a party plaintiff. He now prays that this petition be granted, that the judgment of the court of appeals and the judgment of the district court be reversed, and the injunction be vacated, and the suit dismissed for want of personal jurisdiction over the purported plaintiff, because the suit was not filed by an authorized agent, with the result it is not a party to this litigation, or over the individual plaintiff by reason of the provisions of 28 USC § 1359.

"Lumiweld" is an aluminum alloy rod.

"ALUMISMITH, INC., is a business corporation that primarily deals in the mail order

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sale of "Lumiweld" and ancillary products.

JAMES J. HILLE is a one-third equal shareholder, and a one-third equal holdover director, and the holdover President of the corporation.

JOHN M. SADLER is also a one-third equal shareholder, and also a one-third equal holdover director, and the holdover Vice-President of the corporation.

HOUSTON M. SADLER, who is not a party to this suit, is also a one-third equal shareholder, and also a one-third equal holdover director, and the holdover Secretary-Treasurer of the corporation.

The district court and the court of appeals state that the first motion is a motion to strike the appearance of Alumismiths, Inc., as plaintiff, and that: "Defendant contends that the co-plaintiff, James Hille, was with-

out authority to bring this action on the part of Alumismiths. As a result, defendant asserts, this court does not have jurisdiction over Alumismiths. Under Rule 9(a) Fed. R. Civ. P. a defendant wishing to raise the issue of the plaintiff's capacity to sue must do so in his answer to the complaint. Failure to raise the issue results in its waiver. . . . It is too late for defendant to raise the issue of Hille's authority to bring suit on Alumismith's behalf.""By his second motion defendant seeks to vacate the preliminary injunction. The motion is predicated on defendant's argument that Alumismiths is not a proper party because Hille had no authority to sue. Since the court has rejected this argument, the motion to vacate must also fall.""The last motion asks the court to strike the appearance of plaintiffs' attorneys, to strike the complaint insofar as it seeks relief on behalf of Alumismiths, and to impose sanctions against James Hille, pur-

suant to Rule 11 Fed. R. Civ. P. This motion is frivolous and devoid of any analysis worthy of consideration by this court."

Petitioner disagrees.

REASONS FOR GRANTING THE WRIT

The District Court erred in entering an injunction, and in refusing to vacate it, and in failing to strike the appearance of its attorneys, and to dismiss this action as to it, for want of jurisdiction of the person of the corporation, by reason of the fact that the President has no authority to file suit in the name of that corporation, without the approval of its Board of Directors or the approval of its stockholders, and in order to bring the corporation into court it must be named a party defendant and served with summons. The purported appearance of ALUMISMITHS, INC., is fictitious, because its board of directors did not authorize the suit to be filed, and Hille,

as president, had no authority express or implied, to file it, with the result that a fraud has been perpetrated on the federal courts, to the detriment of the corporation by reason of the fact that an injunction has been issued in the name of the corporation, to the damage of the corporation in loss of income, and to the defendant himself in loss of commissions, and to the extent he has had to hire and defend this fictitious suit.

28 USC § 1359 provides:

> "A district court shall not have jurisdiction of a civil action in which any party by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court. (June 25, 1948, c. 646, 62 Stat. 935.)."

The courts have been given full authority to protect themselves against the false pretenses of apparent parties. Farmington v Pillsbury, 1884, 114 US 138, at page 143. It is the duty of the court, on its own motion, without wait-

for the parties, to stop all further proceedings, and dismiss the suit the moment a fraud on its jurisdiction is discovered. Williams v. Nottawa, 104 U.S. 209, 211.

Ch. 32 Corporations § 8.05(a) 1 Ill. Rev. Stat. 1985, page 1689, provides:

> "E/ach corporation shall have a board of directors and the business and affairs of the corporation shall be managed by or under the direction of the board of directors."

§ 8.50 p 1691, provides:

> "All officers and agents of the corporation, as between themselves and the corporation, shall have such express authority and perform such duties in the management of the property and affairs of the corporation as may be provided in the by-laws, or as may be determined by resolution of the board of directors not inconsistent with the by-laws and such implied authority as recognized by the common law from time to time."

13 Illinois Law & Practice "Corporations" states: The board of directors is vested with the control and management of corporate affairs, and within the limit of their authority

the directors possess full discretionary power. § 312. The officers and agents of a corporation may sue or defend in behalf of the corporation where so authorized expressly or by necessary implication. § 438. A corporation is not bound by, or liable for, an action brought by its officers or agents without authority to do so." § 438 p 568.

In Sterling Industries, Inc., Respt., v. Ball Bearing Pen Corporation et al, Appts., New York Court of Appeals——March 3, 1949, 298 NY 483, 84 NE2d 790, 10 ALR2d 640, the plaintiff corporation brought suit for breach of an alleged exclusive agency contract executed by plaintiff and defendant. It appeared that two groups of men organized plaintiff, one of them consisting of representatives of defendant. At a meeting of plaintiff's board of directors, of which there were four, a motion that the present litigation be instituted was approved by two of the directors and disapproved by the

other two. Subsequently the suit was commenced by order of the plaintiff's president, who was a member of the organizational group which did not include defendant's representative and who was one of the directors voting in favor of the motion voting in favor of the motion that the suit be commenced.

Holding that plaintiff's president had no authority to institute the action after a majority of the directors had failed to sanction it, the Court of Appeals reversed the Appellate Division and affirmed the action of the Special Term in vacating the service of summons and the complaint on the ground that plaintiff had not authorized the institution or prosecution of the action.

This brings us to the matter of Rule 9(a) of the Federal Rules of Civil Procedure. It has no application to the present situation. We are not dealing with any issue of the capac-

ity of a corporation to sue or be sued. It undoubtedly has the capacity to sue or be sued. The corporation is not a party to this litigation because the individual plaintiff was not authorized to file the suit in the name of the corporation.

The district court and the court of appeals have so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision in holding that jurisdiction over the corporation could be obtained by waiver.

CONCLUSION

This petition for writ of certiorari should be granted and all the relief prayed for herein given petitioner, and 28 USC § 1359 rigorously enforce.

Respectfully submitted,

Hugh M. Matchett

HUGH M. MATCHETT

APPENDIX

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 53]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Submitted May 29, 1987*

June 9, 1987.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*

ALUMISMITHS, INC., an Illinois corporation, and JAMES HILLE,

Plaintiffs-Appellees,

No. 86-1713 v.

JOHN SADLER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 81 C 1965—**Ann C. Williams,** *Judge.*

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need for Oral Argument." *See* Fed. R. App. P. 34(a); Circuit Rule 34(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

ORDER

Defendant-appellee, John Sadler, appeals from the district court's order of April 25, 1986 denying his motion to vacate a preliminary injunction entered against him over two and one-half years ago, on September 14, 1983. The district court order denying Sadler's motion to vacate, as well as for other relief, adequately addresses the issues raised by this appeal; accordingly, we adopt Judge Williams' opinion as our own.[1]

AFFIRMED.

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[1] We note that the reference in the district court order to *Morgan Guaranty Trust Company of New York v. Blum*, 649 F.2d 342 (5th Cir.) should be amended to reflect the fact that the case was decided in 1981.

JUDGMENT — WITHOUT ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 9, 1987.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*

ALUMISMITHS, INC., an Illinois corporation, and JAMES HILLE,

Plaintiffs-Appellees,

No. 86-1713 vs.

JOHN SADLER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 81 C 1965—**Ann C. Williams**, *Judge.*

This cause came before the Court for decision on the record from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 81 C 1965
DOCKETED
APR 25, 1986

ALUMISMITHS, INC., an Illinois corporation, and JAMES HILLE,

Plaintiffs,

v.

JOHN SADLER,

Defendant.

MEMORANDUM OPINION AND ORDER

This trademark action was filed on April 8, 1981. After much procedural delay by defendant, discovery was ordered closed on September 15, 1982. On February 24, 1983, this court granted plaintiffs' motion for default judgment and entered judgment in the amount of $15,018.75, punitive damages of $10,000, plus costs of $543.20. But on May 10, 1983, the court, on the defendant's motion, vacated the judgment. On September 14, 1983, a preliminary injunction was entered enjoining defendant from using the trademark of plaintiff Alumismiths, Inc.

This case is now on its third judge of this court and defendant is on his third attorney. This third attorney has now filed five motions with the court. None of them have any merit and indeed are too extravagant to require lengthy discussion.

The first is a motion to strike the appearance of Alumismiths as plaintiff. Defendant contends that the co-plaintiff, James Hille, was without authority to bring this action on the part of Alumismiths. As a result, defendant asserts, this court does not have jurisdiction over Alumismiths. Under Rule 9(a) Fed. R. Civ. P. a defendant wishing to raise the issue of the plaintiff's capacity to sue must do so in his answer to the complaint. Failure to raise the issue results in its waiver. *Morgan Guaranty Trust Company of New York v. Blum*, 649 F.2d 342 (5th Cir. 1951); *Volkswagonwerk Aktiengesellschaft v. Dreer*, 253 F. Supp. 37 (D.C. Pa. 1966); 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1295 (1969). Discovery has been closed in this case for more than three years. The preliminary injunction has been in effect for more than two years. It is too late for defendant to raise the issue of Hille's authority to bring suit on Alumismiths' behalf.

By his second motion defendant seeks to vacate the preliminary injunction. The motion is predicated on defendant's argument that Alumismiths is not a proper party because Hille had no authority to sue. Since the court has rejected this argument, the motion to vacate must also fall.

Next defendant moves to amend his answer to assert a counterclaim against Alumismiths. This motion too is untimely. Rule 13(f) allows a pleader to amend his answer to assert a counterclaim previously omitted through oversight, inadvertence, or excusable neglect, or when justice requires. Fed. R. Civ. P. 13(f). However, the court has discretion whether or not to allow the amendment. Not only has discovery been closed for some time, but a pretrial order has already been entered in this case. Moreover, defendant's request to amend is based on his erroneous assumption that Alumismiths is not a proper plaintiff in this action. He wants Alumismiths realigned as a defendant who can then assert a counterclaim against Hille. The proposition is absurd coming as it does five years after the complaint was filed.

For the reasons already stated, the fourth motion, which seeks to compel discovery, is untimely and thus denied.

The last motion asks the court to strike the appearance of plaintiffs' attorneys, to strike the complaint insofar as it seeks relief on behalf of Alumismiths, and to impose sanctions against James Hille, pursuant to Rule 11 Fed. R. Civ. P. This motion is frivolous and devoid of any analysis worthy of consideration by this court. motion is therefore denied.

In conclusion the court denies all the pending motions filed by defendant.

Dated: April 21, 1986

ENTER:

/s/ ANN CLAIRE WILLIAMS
Judge

(R DOC 148 Pages 645-647.)